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# SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 160

STATE OF FLORIDA ex rel
DONALD L. FARBER,

Petitioner,

vs.

HONORABLE GENE WILLIAMS, as one of the Judges of the Criminal Court of Record of Dade County, Florida,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, DONALD F. FARBER, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in this case on February 23, 1966.

## OPINIONS BELOW

The Opinion of the Supreme Court of Florida (infra Appendix A, Pages App. 1-10) is reported at 183 So. 2d 537.

## JURISDICTION

The judgment of the Supreme Court of Florida was entered on February 23, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are as follows:

1. Florida Statutes Section 877.02(1) (infra Appendix B, App. Pages 10-11).

2. The Fourteenth Amendment to the Constitution of the United States (infra Appendix C, App. Page 11).

3. The First Amendment to the Constitution of the United States (infra Appendix D, App. Pages 11-12).

4. The Fifth Amendment to the Constitution of the United States (infra Appendix E, App. Page 12).

## STATEMENT OF THE CASE

The petitioner was indicted on April 22, 1965 by the Dade County Grand Jury, Fall Term 1964, for solicita-

tion of legal services. The indictment set forth, generally, that the petitioner did unlawfully and intentionally, directly or indirectly, solicit legal business of or from William David McDaniels and Laura McDaniels his wife, as natural parents and natural guardians and on behalf of their son, Bert Lee McDaniels, a minor, or procure through solicitation of William David McDaniels and Laura McDaniels a retainer authorizing an attorney to render legal services. An information was filed against the petitioner in the Criminal Court of Record of Dade County, Florida, which information was based upon facts alleged in the indictment as hereinabove set forth. The petitioner filed in the Criminal Court of Record of Dade County his Motion To Quash Information upon the grounds, inter alia, that Florida Statutes 877.02 (1), under which the information was filed, is void and unconstitutional; that the statute violates the provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution in that the statute is too vague, indefinite and ambiguous to sufficiently define the acts which will constitute a criminal offense; that the statute unduly inhibits the constitutionally protected rights of speech and association; and that the statute deprives petitioner of the equal protection of the laws.

The Motion to Quash was denied by the Criminal Court of Record of Dade County. Petitioner thereupon filed his Suggestion for Writ of Prohibition with the Supreme Court of Florida, which Suggestion alleged the unconstitutionality of the said Florida Statutes §877.02 (1) under the provisions of the First and Fifth and Fourteenth Amendments to the United States Constitution as specifically applied by this Court in **Brotherhood of Railroad Trainmen vs. Virginia ex rel Virginia State Bar,**

377 U. S. 1, **National Association for the Advancement of Colored People vs. Button,** 371 U. S. 415, and **Cramp vs. Board of Public Instruction of Orange County,** 368 U. S. 298.

On February 23, 1966 the Supreme Court of Florida entered its decision which is hereby sought to be reviewed. In its Opinion the Supreme Court of Florida ruled the said §877.02 (1) to be valid and rejected the petitioner's contentions that the said statute is unconstitutional under the First, Fifth and Fourteenth Amendments to the United States Constitution.

## REASONS FOR GRANTING THE WRIT

Florida Statutes §877.02 (1) provides

> "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, . . ."

This statute, like the Virginia statute ruled upon in **National Association for the Advancement of Colored People vs. Button, supra,** was adopted subsequent to this Court's decision in **Brown vs. Board of Education,** 347 U. S. 483. As noted by Justice Douglas in his concurring opinion in **National Association for the Advancement of Colored People vs. Button, supra,**

> "The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P. and representing litigants without charge."

Like its Virginia counterpart, the Florida statute has the objectionable qualities of vagueness and overbreadth which render it susceptible of sweeping and improper application in the area of First Amendment freedoms. Although the Florida Supreme Court stated in its Opinion,

> "The object of §877.0 (1) is to prohibit the solicitation of legal business by an attorney directly or by his agent or employee, or by another acting in his behalf,"

the fact remains that the vague and broad Florida statute lends itself to selective enforcement against unpopular causes.

The Petition for Writ of Certiorari should be granted for the following reasons:

A. In deciding that Florida Statutes §877.02(1) is constitutional the Florida Supreme Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

(1) The decision of the Florida Supreme Court is

repugnant to the decision of this Court in **Cramp vs. Board of Public Instruction of Orange County, Florida,** 368 U. S. 278.

It is the petitioner's contention that the provisions of Florida Statutes §877.02(1) are so vague and indefinite as to render the statute unconstitutional. The vagueness of the statute manifests itself not only with respect to the persons who may be held criminally liable under the statute but, also, and most glaringly, with respect to the meaning of "indirect" solicitation of legal business.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. In **Cramp v. Board of Public Instruction of Orange County, Florida,** 368 U. S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275, this Court held to be unconstitutional a Florida Statute which required each employee of the state to execute a written oath in which he must swear that he has never lent his "aid, support, advice, counsel or influence to the Communist Party." This Court, after pointing out the absurd possibilities to which the statutory phrases could be applied, stated:

> "In light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague or indefinite as to be no rule or standard at all."

The petitioner submits that the phrase "indirect solicitation of legal business" has no determinative meaning and that the language is so general and indefinite as to embrace not only acts which might be legally punishable but also others which are perfectly proper and cannot be punished. What is the meaning of "indirect solicitation of legal business" which this statute purports to make a crime? Certainly an attorney indirectly solicits legal business in many and varied ways which are perfectly proper and ethical. By his devotion to his duty, by his contributions to his profession, by his distinguished conduct in the community, the attorney indirectly solicits legal business. Yet, this statute makes him a criminal for doing so. Numerous decisions and articles have also recognized that there are perfectly proper means of solicitation of legal business. See **In re Cohn**, 100 Ill. 2d 186, 139 N. E. 2d 301, 306; **In re Mitgang**, 52 N. E. 2d 807, 816.

Thus, the petitioner submits that neither he, nor this court, nor any person, can state at what point, under this statute, indirect solicitation of legal business ceases to be ethical and becomes criminal. The statute purports to condemn all manner of indirect solicitation of legal business, but the standard of guilt as to what constitutes criminal solicitation is not supplied.

(2) The decision of the Florida Supreme Court is repugnant to the decisions of this Court in **Brotherhood of Railroad Trainmen vs. Virginia ex rel Virginia State Bar**, 377 U. S. 1, and **National Association for the Advancement of Colored People vs. Button**, 371 U. S. 415.

This Court has specifically approved a form of con-

duct which would be illegal under the statute in question. In **Brotherhood of Railroad Trainmen vs. Virginia ex rel Virginia State Bar,** 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89, this Court held that an injunction which prohibited a labor union from advising injured members to obtain legal advice and recommending specific lawyers violated the provisions of the First and Fourteenth Amendments to the United States Constitution. Under the Florida Statute in question such conduct would be illegal. Thus, we have an affirmative ruling by this Court that certain conduct condemned by the Florida statute is constitutionally protected and cannot, therefore, be the basis for a criminal prosecution. The decision of this Court in the case of **National Association for the Advancement of Colored People vs. Button,** 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 405, establishes, further, that a state statute is unconstitutional where such statute purports to make it a crime for a person to advise another that his legal rights have been infringed and refers him to a particular attorney. The Florida statute in question does purport to make such act a crime and is therefore unconstitutional.

B. By adjudicating §877.02(1) to be valid the Florida Supreme Court is tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

The vagueness and overbreadth of §877.02(1) has already been demonstrated. This Court in **National Association for the Advancement of Colored People vs. Button, supra,** stated, at page 443.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair

notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

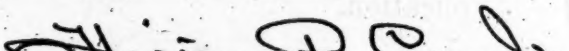
As indicated by Justice Douglas, the decision in **Brown vs. Board of Education, supra,** spawned a progency of state statutes designed to restrict legal assistance to unpopular causes. One of the progency has been eliminated by this Court. However, the Florida Supreme Court has declined to invalidate the Florida offspring. So long as §877.02(1) continues on the statute books, the courts of Florida, and this Court, are permitting the dangerous existence of a penal statute susceptible of sweeping and improper application in the area of First Amendment freedoms. The law of **National Association for the Advancement of Colored People vs. Button, supra,** requires that §877.02(1) meet the same fate as its Virginia counterpart and be declared unconstitutional.

## CONCLUSION

The decisions of this Court hereinabove referred to clearly establish the unconstitutionality of Florida Statutes §877.02(1). In order to provide full protection for First Amendment freedoms against possible restrictions by this vague and broad statute a writ of certiorari should issue to the Supreme Court of Florida to the end that the

decision sought to be reviewed may be reversed by this Court and Florida Statutes §877.02(1) declared unconstitutional.

Respectfully submitted,



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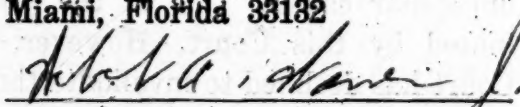

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to HONORABLE EARL FAIRCLOTH, Attorney General, State of Florida, State Capitol Building, Tallahassee, and to RICHARD E. GERSTEIN, State Attorney, 1351 N.W. Twelfth Street, Miami, Florida, this 10 day of May, 1966.